Conspiracies to Monopolize: A Decisional Model

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Section 2 of the Sherman Act prohibits actual monopolization, attempts to monopolize, and conspiracies to monopolize.[1] While much has been written about the first two categories of Section 2 offenses,[2] virtually nothing has been written concerning the offense of conspiring to monopolize. The paucity of the literature on the subject is surprising, since the topic is one of the least settled areas of antitrust law, with considerable controversy in the courts concerning the essential elements of a Section 2 conspiracy.

This Article attempts to shed needed light on the subject by analyzing some of the leading cases involving alleged Sherman Act conspiracies to monopolize. The analysis reveals that much of the confusion in the courts is apparently due to a failure to distinguish between two altogether different types of conspiracies that have been challenged under Section 2 of the Sherman Act. One group of cases has involved conspiracies in which the participants to the conspiracy jointly possess actual monopoly power. A second group of cases has involved incipient conspiracies to monopolize in which monopoly power has not yet been achieved. As will be seen in this Article, each of these forms of Section 2 conspiracies entails a different set of relevant considerations, so that the failure to draw a distinction between the two types of conspiracies is no doubt largely responsible for the state of uncertainty found in many of the existing judicial decisions.

The discussion that follows has been divided into three parts. Part I examines the leading Sherman Act Section 2 conspiracy cases in which the conspirators jointly possess monopoly power. The legal principles that govern cases of this type are identified and explored. Part II of the Article examines Section 2 conspiracies to monopolize in which joint monopoly power has not yet been achieved. The governing legal principles are likewise identified and critiqued for these cases. Part III pulls together the key elements developed in the two prior sections and suggests a coordinated decisional model for use in analyzing Section 2 conspiracy cases and in assessing their antitrust legality.

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1. 15 U.S.C. § 2 (1976).

2. *See, e.g.*, Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 MICH. L. REV. 375 (1974); Hawk, *Attempts to Monopolize—Specific Intent as Antitrust's Ghost in the Machine*, 58 CORNELL L. REV. 1121 (1973); Note, *Attempts to Monopolize Under the Sherman Act: Defendant's Market Power as a Requisite to a Prima Facie Case*, 73 COLUM. L. REV. 1451 (1973); Note, *Monopolization Under Section 2 of the Sherman Act*, 22 S.C.L. REV. 344 (1970); Note, *Attempts to Monopolize Under the Sherman Act: Interpretation and Recent Proposals*, 48 U. CIN. L. REV. 829 (1979).

I. CONSPIRACIES TO MONOPOLIZE IN WHICH THE CONSPIRATORS JOINTLY POSSESS MONOPOLY POWER

Two cases frequently cited as leading precedent on Sherman Act conspiracies to monopolize are the Supreme Court's decisions in *American Tobacco Co. v. United States*[3] and *United States v. Griffith*.[4] However, a careful reading of these cases reveals that they involved some of the strongest evidence of actual monopolization, let alone of conspiracies to monopolize, that the Supreme Court has ever faced. Consequently, the conspiracy elements that the Court prescribed in these decisions are limited to only a particular type of Sherman Act Section 2 conspiracy—namely, one in which actual monopoly power has been jointly achieved by the conspirators.

American Tobacco was a criminal antitrust action against the three dominant producers of cigarettes, several of their officials, and a subsidiary of one of the three companies. The defendants were convicted on four counts under Sections 1 and 2 of the Sherman Act: conspiracy in restraint of trade, monopolization, attempted monopolization, and conspiracy to monopolize. Certiorari was granted on the narrow issue of "whether actual exclusion of competitors is necessary to the crime of monopolization under § 2 of the Sherman Act."[5] The Supreme Court held that actual exclusion is not an element of the offense and that it is enough that "power exists to raise prices or to exclude competition when it is desired to do so."[6]

In so holding, however, the Court went far beyond the narrow legal issue actually before it. Detailed attention was given to the conspiracy evidence on which the convictions were based, consisting of evidence that the defendants had, through a variety of concerted actions,[7] achieved joint control over more than sixty-eight percent of the national cigarette market and eighty percent of the field of cigarettes comparable to those produced by the defendants.[8] Given the strength of the conspiracy evidence and the clearly dominant market share jointly achieved by the defendants,[9] the Court readily concluded that a Sherman Act Section 2 conspiracy had been established. The Court outlined the elements of analogous Section 2 conspiracy cases in the following terms:

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3. 328 U.S. 781 (1946).

4. 334 U.S. 100 (1948).

5. 328 U.S. 781, 784 (1946).

6. *Id.* at 811.

7. The defendants had conspired to control the purchase of the raw materials (leaf tobacco) used in the production of their products by concerting control of existing tobacco auction markets, discouraging the establishment of new auction markets, bidding up the prices competitors had to pay for their supplies, and buying up lower grades of tobacco so as to prevent competition by manufacturers of lower priced cigarettes. In addition, the defendants had conspired to fix cigarette prices at a level that would thwart competition by cheaper grade cigarettes.

8. 328 U.S. 781, 795–96 (1946).

9. Predominant market shares can be compelling evidence that monopoly power has been achieved. *See, e.g.*, United States v. Grinnell Corp., 384 U.S. 563, 571 (1966); United States v. Aluminum Co. of America, 148 F.2d 416, 429 (2d Cir. 1945).

> A correct interpretation of the statute and of the authorities makes it the crime of monopolizing, under § 2 of the Sherman Act, for parties, as in these cases, to combine or conspire to acquire or maintain the power to exclude competitors from any part of the trade or commerce among the several states or with foreign nations, provided they also have such a power that they are able, as a group, to exclude actual or potential competition from the field and provided that they have the intent and purpose to exercise that power.[10]

Further elaboration of the law of Section 2 conspiracies was provided by the Supreme Court's subsequent decision in *United States v. Griffith.*[11] The case involved a government antitrust action against a group of motion picture exhibitors, alleging violations of Sections 1 and 2 of the Sherman Act. The exhibitors controlled all motion picture theatres in numerous towns throughout a broad geographic circuit. They misused the buying power that this control gave them to exact from distributors preferential contracts giving the exhibitors exclusive "first-run" rights to movies in not only those towns that they controlled but in other towns where they had competitors.

The district court dismissed the complaint in *Griffith* on the ground that the government failed to prove that the conspirators had acted for the specific "purpose" of driving out their competitors and monopolizing the theatre circuit. The Supreme Court reversed, reasoning that since the conspirators had actually "bargained for and obtained" monopoly rights "by the use of monopoly power,"[12] it was not necessary to prove "specific intent to . . . build a monopoly."[13] Rather, it was sufficient that a "necessary and direct result" of the conspirators' joint conduct was the "monopolizing of trade within the meaning of the Sherman Act."[14] The Court was careful to distinguish the case, however, from other cases in which actual monopoly power has not yet been achieved.[15]

Taken together, *American Tobacco, Griffith,* and other analogous cases[16] suggest a number of relevant factors to be considered when assessing the Section 2 legality of those conspiracies in which the participants jointly possess monopoly power. The most obvious such factor is proof of the conspir-

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10. 328 U.S. 781, 809 (1946).

11. 334 U.S. 100 (1948).

12. *Id.* at 109.

13. *Id.* at 105.

14. *Id.* at 105–06.

15. Thus, the Court stated, "Specific intent in the sense in which the common law used the term is necessary only where the acts fall short of the results condemned by the Act." United States v. Griffith, 334 U.S. 100, 105 (1948).

16. *See, e.g.,* Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948); Schine Theatres v. United States, 334 U.S. 110 (1948); United States v. Gypsum Co., 333 U.S. 364 (1948); Hartford-Empire Co. v. United States, 323 U.S. 386 (1945); United States v. Crescent Amusement Co., 323 U.S. 173 (1944).

acy itself. Once the existence of a conspiracy has been established,[17] the market shares or other indicators of market power of the individual conspirators can be aggregated and viewed as a whole for purposes of determining whether the conspirators have actual monopoly power.[18] If it is demonstrated that they jointly possess such power, it must then be proven that they have the "intent and purpose" to exercise this power.[19] The "intent" that must be demonstrated is not, however, the more demanding "specific intent" that must be shown if monopoly power has not yet been reached. Rather, the necessary inquiry is into whether the conspirators intend to engage in concerted action having the "necessary and direct result" of monopolizing the industry.[20]

American Tobacco and *Griffith* are noteworthy not only for the principles they set forth, but also for the questions that they raise and fail to answer. *American Tobacco* prohibits conspiracies to monopolize "any part of the trade or commerce among the several states,"[21] provided that the requisite showings of monopoly power and intent are made. But what "part" of trade and commerce did the Court have in mind? Must a full-blown "relevant market" be proven, as in single firm monopolization cases, or will something less suffice?

Griffith likewise suggests a troubling issue. The decision prohibits conspiratorial acts by companies having joint monopoly power, if the "necessary and direct result" of the acts is "monopolization."[22] But what types of acts are so prohibited: all those having such a consequence or only those that are shown to be predatory or otherwise competitively unreasonable?

Regarding the first of these unanswered questions, definition of the relevant market, it is helpful to examine the leading Supreme Court decision on single firm monopolization, as distinguished from attempts or conspiracies to monopolize. That case, *United States v. Grinnell Corp.*,[23] involved the monopolization of the national accredited central station alarm market by four

17. Proof of a conspiracy can be found not only in an exchange of words but in a course of dealing between the conspirators or other circumstantial evidence. In *American Tobacco*, for example, the conspiracy was proven by parallel behavior and by dealings between the conspirators. *See also* United States v. United States Gypsum Co., 333 U.S. 364 (1948) ("prima facie" conspiracy established by industry-wide licensing agreements entered into with knowledge of the adherence of others in a common illegal scheme); United States v. Singer Mfg. Co., 374 U.S. 174 (1963) (conspiracy established by course of dealing and by statements of co-conspirators). *See generally* L. SULLIVAN, ANTITRUST 311–29 (1977); J. VON KALINOWSKI, ANTITRUST LAW AND TRADE REGULATION § 9.02[2] (1979).

18. Aggregation of the conspirators' market shares can convincingly establish the existence of joint monopoly power. *See, e.g.*, American Tobacco Co. v. United States, 328 U.S. 781 (1946) (a combined market share of over 80%); Hartford-Empire Co. v. United States, 323 U.S. 386 (1945) (a combined market share of over 94%).

19. *See* text accompanying note 10 *supra*.

20. *See* text accompanying notes 12–15 *supra*.

21. *See* text accompanying note 10 *supra*.

22. *See* text accompanying note 14 *supra*.

23. 384 U.S. 563 (1966).

affiliated corporations.[24] The companies had seized eighty-seven percent of the market through a variety of exclusionary practices, including the acquisition of competitors, the allocation of markets among themselves, and threats of retaliatory pricing against potential competitors. In finding that actual monopolization had occurred, the Supreme Court articulated the following standard for the offense of monopolization:

> The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.[25]

In essence, the Court identified three separate components of the offense of single firm monopolization: (1) proof of the "relevant market";[26] (2) the possession of "monopoly power" within that market;[27] and (3) the "willful acquisition or maintenance of that power," as opposed to market power achieved through competitively justifiable means.[28] *Grinnell* thus explicitly required that a "relevant market" be proven for cases involving Sherman Act charges of single firm monopolization.

Should a Section 2 conspiracy to monopolize be treated any differently? Logic suggests not. The function of market definition in a single firm monopolization case is to focus inquiry on the particular competitive area within which the defendant has allegedly achieved monopoly power.[29] Since monopoly power is defined as the power to "control prices or exclude competi-

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24. The companies were a parent corporation and its three subsidiaries. Since multiple corporations were involved, the case arguably could have been brought as a "conspiracy to monopolize." *See, e.g.*, United States v. Yellow Cab Co., 332 U.S. 218 (1947). *See generally* J. VON KALINOWSKI, ANTITRUST LAW AND TRADE REGULATION § 9.04[2] (1979). The case instead came before the Supreme Court as an actual monopolization case, with the affiliated corporations treated as divisions of a single entity.

25. 384 U.S. 563, 570–71 (1966).

26. The Court adopted the *"du Pont"* relevant market test, which requires consideration of the interchangeability of substitute products and cross-elasticity of demand. *Id.* at 571–72 (1966). In addition, the Court indicated that the *"Brown Shoe"* submarket indicia, employed in Clayton Act § 7 cases, may also be employed in Sherman Act § 2 cases. *Id.* at 572. For further information concerning proof of "relevant markets," *see* ABA ANTITRUST LAW DEVELOPMENTS 48–52 (1975); L. SULLIVAN, ANTITRUST 41–47 (1977); J. VON KALINOWSKI, ANTITRUST LAW AND TRADE REGULATION § 8.02[2] (1979); Holmes and Hennigan, *Antitrust Law Developments*, 54 CHI.-KENT L. REV. 309, 309–18 (1978).

27. The Court held that proof of monopoly power can be inferred from a "predominant share of the market," and that the 87% share held by the defendants was a predominant share. 384 U.S. 563, 571 (1966). *See also* the cases cited in note 18 *supra*. For general information on proof of monopoly power, *see* ABA ANTITRUST LAW DEVELOPMENTS 53–55 (1975); L. SULLIVAN, ANTITRUST 74–93 (1977); J. VON KALINOWSKI, ANTITRUST LAW AND TRADE REGULATION § 8.02[3] (1979).

28. The Court concluded that the extreme exclusionary practices engaged in by the defendants clearly met this requirement. 384 U.S. 563, 571 (1966). For recent cases attempting to clarify the distinction between the "willful acquisition or maintenance" of monopoly power, and permissible acts allowed by *Grinnell*, see California Computer Prods. v. IBM Corp., 613 F.2d 727 (9th Cir. 1979); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); Telex Corp. v. IBM Corp., 510 F.2d 894 (10th Cir. 1975); and SCM Corp. v. Xerox Corp., 645 F.2d 1195 (2d Cir. 1978). *See generally* L. SULLIVAN, ANTITRUST 106–32 (1977); J. VON KALINOWSKI, ANTITRUST LAW AND TRADE REGULATION § 8.02[4] (1979).

29. *See generally* Note, *Relevant Geographic Market Delineation: The Interchangeability of Standards in Cases Arising Under Section 2 of the Sherman Act and Section 7 of the Clayton Act*, 1979 DUKE L.J. 1152; Note, *Prosecutions for Attempt to Monopolize: The Relevance of the Relevant Market*, 42 N.Y.U.L. REV. 110 (1967).

tion,"[30] it is necessary to identify with some precision the area of trade within which the defendant allegedly enjoys this price and production control. As the Supreme Court has said, "[W]here there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist."[31] Definition of the relevant market simply reflects judicial recognition of these market alternatives.

In a similar vein, relevant market definition in a conspiracy to monopolize case focuses attention on the area of competition within which the conspirators have allegedly "conspired" to seize monopoly power over product price and production. If, because of the ready availability of competitive products *even after* the conspiracy has achieved all of its objectives, the conspiracy cannot achieve such price and output control, then it is erroneous to argue that the conspirators "intended" to achieve "monopoly power." This is like arguing that a group of marksmen, having intentionally shot their arrows at a small pine tree, actually "intended" to hit a large oak at which they weren't even aiming. This is neither sound logic nor a sensible application of judicial resources, since it encourages Section 2 conspiracy cases that have nothing to do with the true antimonopolization functions of Section 2 of the Sherman Act.[32]

An excellent illustration of the bizarre results that can follow from failing to require proof of the relevant market in Section 2 conspiracy cases is the 1961 decision of *United States v. Consolidated Laundries Corporation*.[33] The case involved an alleged Section 2 conspiracy among several linen supply services in the greater metropolitan New York area to control the market by allocating customers and coercing other linen supply services into joining the conspiracy. The conspiracy had achieved control of only about one percent of the linen supply business in the affected geographic area. The Second Circuit nevertheless held that this miniscule market share was not pertinent, since, according to the court, proof of the "relevant market" is *not* an essential element of a Section 2 conspiracy case, and all that need be shown is an effect upon some "appreciable" amount of interstate commerce ($523,168 in linen supply business was held to be sufficient).[34]

The insignificant market share in *Consolidated Laundries* should have been highly germane to a sensible resolution of the case. With only one percent of a market characterized by numerous small competing concerns, it is hard to see how the conspirators "intended" to achieve monopoly control. The defendants' insignificant share of the market should have cut strongly against the finding of intent essential to a Section 2 conspiracy to monopolize,

30. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956). *See generally* the cases and articles cited at notes 18 and 27 *supra*.

31. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 394 (1956).

32. For a very good discussion of the arguments for and against requiring relevant market definition in conspiracy to monopolize cases, *see* Note, *The Relevant Market Concept in Conspiracy to Monopolize Cases under Section 2 of the Sherman Act*, 44 U. CHI. L. REV. 805 (1977).

33. 291 F.2d 563 (2d Cir. 1961).

34. *Id.* at 572–73.

making market shares and, hence, relevant market definition potentially vital issues in the case.

As indicated above, definition of the relevant market was not the only issue suggested but left unresolved by the Supreme Court's decisions in *American Tobacco* and *Griffith*. A further unanswered question was whether *any* joint action that contributes to the maintenance of monopoly power in the hands of a group of alleged conspirators will constitute Section 2 monopolizing misconduct. The sweeping language in *Griffith*[35] can arguably be read in just such a manner, leaving no room for concerted action by a group of companies once it is shown that they jointly possess monopoly power, if a result of such action is the maintenance of their market dominance.

It is doubtful that the Supreme Court intended such a draconian result. To suggest otherwise would be to proscribe virtually any coordinated action by a group of companies that can be characterized as jointly possessing monopoly control over prices and output, regardless of the motivations behind the action. Assume, for example, that the major producers of drugs for a debilitating disease, having failed in their individual attempts to develop a complete treatment for the disease, pool their research capabilities to accomplish this objective, subject to the express requirement that they will license the fruits of their joint work to anyone else on nondiscriminatory terms. It is probable that the "first entrant" advantages in such a project will be substantial, severely undercutting the ability of later licensee entrants to compete on truly equal terms with those participating in the venture. Arguably, then, a "necessary and direct result" of such a research effort would be to further entrench and maintain the market dominance of the research participants. Does this mean that such a project, or any similar coordinated venture among the dominant firms within an industry, is flatly proscribed by Section 2 of the Sherman Act?

Surely this was not what the Supreme Court intended, for other decisions by the Court and lower federal courts have explicitly recognized that illegal monopolization does not result from literally any act that can be said to produce or maintain monopoly power. As expressed by the Supreme Court, the offense of monopolization prohibits only the "willful acquisition or maintenance" of monopoly power, "as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[36] Similarly, Judge Wyzanski, in the oft-cited case of *United States v. United Shoe Machinery Corp.*,[37] drew an express distinction between illegal monopolizing conduct and market dominance resulting from such pro-competitive factors as "superior skill," "superior products," "economic or tech-

35. *See* text accompanying notes 12–14 *supra*.
36. United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).
37. 110 F. Supp. 295 (D. Mass. 1953).

nological efficiency," and "scientific research."[38] These and similar cases demonstrate that Section 2 of the Sherman Act is not a rigid statute looking only to demonstrations of market share, but, instead, contains both flexibility and a willingness to consider possible justifications for challenged business practices.

Thus, at least some give and take seems both necessary and appropriate for Sherman Act Section 2 cases, even those involving alleged conspiracies already in possession of monopoly power, with the key question being how to build this flexibility into the case law. One possible approach can be readily rejected: it does not seem appropriate to simply carry over into the context of Section 2 conspiracies that have achieved monopoly power the same economic justifications suitable for either single firm monopolization cases or for incipient Section 2 conspiracies to monopolize. The potential hazards to competition become greater when companies act in concert than when they act alone, making joint action between competitors inherently more suspect. Similarly, the needed flexibility diminishes as the market control of the conspirators increases, because the dangers to competition are more obvious when the participants to an illegal conspiracy have already achieved control over the industry.[39]

Accordingly, less flexibility is called for in Section 2 conspiracies involving the actual possession of monopoly power than in either single firm monopolization cases or conspiracies that have not yet achieved industry dominance. This distinction is best explained by means of an illustration. Assume that a single firm monopolist has provided the funding to an independent research laboratory to develop a new form of a drug, in return for exclusive rights in the fruits of the research. Such an arrangement may arguably further entrench the monopolist's market dominance, but, nevertheless, be justifiable under Section 2, as, for example, where the monopolist reasonably would not have provided the funding without the protection of exclusive rights and where the research would not otherwise have been done.[40] Next, assume that a similar research arrangement is entered into by a group of competing companies that do not individually or jointly have market power. The exclusivity of the arrangement may again pass Section 2 muster. For example, the arrangement may actually enhance competition between the participants and larger nonparticipating firms, giving the small firms the

38. *Id.* at 342. *See also* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 291 n.50 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) (distinguishing between the misuse of monopoly power and competitive advantages achieved through "efficiency, prestige, and innovativeness"); United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945) (distinguishing between illegal monopolizing behavior and monopolies created by "force of accident" or "superior skill, foresight and industry").

39. *See, e.g.*, Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263(2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), in which the Second Circuit observed that the "benefits and detriments" of joint action will "vary with the circumstances," with "the market power of the participant firms" likely to be "the most significant factor." *Id.* at 301.

40. *See, e.g.*, SCM Corp. v. Xerox Corp., 463 F. Supp. 983 (D. Conn. 1978), *aff'd*, 645 F.2d 1195 (2d Cir. 1981); United States v. E.I. du Pont de Nemours & Co., 118 F. Supp. 41 (D. Del. 1953), *aff'd*, 351 U.S. 377 (1956).

benefits of research that none of them could have funded on its own.[41] Lastly, assume that the research funding comes from a group of competitors possessing joint monopoly power, and that they, too, demand exclusive rights in the fruits of the research. Section 2 may well prohibit the exclusivity of this arrangement, due to the added competitive danger inherent in joint action by companies already in control of an industry.[42]

A similar line of reasoning is employed by the Justice Department in its recently announced *Antitrust Guide Concerning Research Joint Ventures*.[43] The *Guide* observes that joint research and product development ventures may give rise to a broad range of potential antitrust problems, including possible challenges as illegal Section 2 conspiracies to monopolize. It then presents a highly useful overview of the principal factors that the Antitrust Division will consider when assessing the legality of such arrangements.[44] A factor given particular emphasis is the market power of the participant firms. As stated in the *Guide*, joint research projects that include "the dominant firm or firms in an industry" pose special "antitrust concerns,"[45] while projects involving only "a number of the smaller firms in an unconcentrated industry" are "particularly unlikely" to have illegal anticompetitive effects.[46] Taking this distinction still further, the *Guide* states that joint research ventures may be "presumptively lawful" if they are limited to participants whose market shares are so small that they could merge without being challenged under the Justice Department's merger guidelines.[47] At the other end of the spectrum, the *Guide* concludes that ventures involving the major firms in an industry will be subjected to particularly sharp scrutiny. However, rather than imposing an inflexible rule flatly prohibiting joint ventures among dominant firms, the *Guide* expressly allows for consideration of the potential "competitive justifications" for such projects.[48] Finally, directing its attention to the antitrust ramifications of specific competitive restrictions in joint venture arrangements, the *Guide* concludes that some restraints are so inher-

41. *See, e.g.*, United States v. National Malleable & Steel Castings Co., 1957 Trade Cas. (CCH) ¶ 68,890 (N.D. Ohio), *aff'd per curiam*, 358 U.S. 38 (1958). It must be remembered, however, that a conspiracy may pass Section 2 muster and still violate Section 1 of the Sherman Act.

42. *See, e.g.*, Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

43. ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE, ANTITRUST GUIDE CONCERNING RESEARCH JOINT VENTURES (1980), *reprinted in* ANTITRUST & TRADE REG. (BNA) No. 992 (Special Supp. Dec. 4, 1980).

44. These factors include: the nature of the proposed research and the relative contributions of the venture's participants; the structure of the industry and the relative positions of the venturers in the industry; the scope and duration of the venture; justifications for the venture; and the accessibility of venture participation or the research results to outsiders. ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE, ANTITRUST GUIDE CONCERNING RESEARCH JOINT VENTURES (1980).

45. *Id.* at 11.

46. *Id.* at 7.

47. *Id.*

48. *Id.* at 8–14.

ently anticompetitive as to be "conclusively unreasonable" and, hence, per se illegal,[49] while other restraints are to be assessed by a rule of reason standard.[50]

Sources such as the Justice Department's *Guide for Research Joint Ventures* and the *Grinnell* decision, discussed earlier in this article, suggest that further refinements are needed in the basic test set forth in the Supreme Court's *American Tobacco* and *Griffith* decisions for Section 2 conspiracies that have actually achieved joint monopoly power. Under *American Tobacco,* once the existence of a Section 2 conspiracy has been established, the market shares or other indicators of market power of the individual conspirators can be aggregated for purposes of determining whether the conspirators jointly possess monopoly power.[51] In making this determination, however, the "relevant market" within which the conspiracy operates must first be identified, and it should not be enough that the conspiracy simply affects a significant "amount" of interstate trade.[52]

When the conspirators jointly possess monopoly power, the case will take on special significance, calling for the application of rules unique to this type of situation. While it still must be demonstrated under *American Tobacco* that the conspirators have the "intent and purpose" to exercise their combined monopoly power, the intent that must be shown is less demanding than the "specific intent" required for Section 2 conspiracies that have not yet achieved monopoly power. Instead, a prima facie case is established under *Griffith* if the conspirators intended to engage in conduct having the "necessary and direct result" of maintaining their monopoly power within the defined relevant market.[53] Such a finding does not necessarily end the inquiry, however, for consideration may still have to be given to the possible competitive justifications for the challenged joint action. As indicated in the Justice Department's *Guide for Research Joint Ventures,* some concerted actions are so inherently anticompetitive as to be conclusively unreasonable.[54] Examples of these per se illegal combinations include agreements among competitors to fix prices, to divide customers and territories, or to drive competitors from a market through concerted refusals to deal.[55] If the

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49. *Id.* at 14–15. Examples of "conclusively unreasonable" restraints given in the GUIDE include agreements having the sole or primary purpose of fixing prices and dividing markets or customers, and most tying arrangements and group boycotts.

50. ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE, ANTITRUST GUIDE CONCERNING RESEARCH JOINT VENTURES 15 (1980). Examples given in the GUIDE of collateral restraints subject to rule of reason analysis include the exchange of patents and know-how possessed by the participants who contribute directly to the success of the research project, the division of particular aspects of the research among the venturers, and agreements not to disclose the results of the joint research to outside parties until patents are obtained.

51. *See* text accompanying notes 7–10 and 17–18 *supra.*

52. *See* text accompanying notes 23–34 *supra.*

53. *See* text accompanying notes 12–15 *supra.*

54. *See* text accompanying note 49 *supra.*

55. *See, e.g.,* United States v. Grinnell Corp., 384 U.S. 563 (1966) (monopolization by allocating markets, acquiring competitors, and threatening discriminatory pricing); United States v. Griffith, 334 U.S. 100 (1948) (joint monopolization by coercing suppliers into a refusal to deal with the conspirators' competitors on equal

joint action is of this per se illegal character, then the inquiry ends, and no further consideration need be given to alleged justifications for the challenged Section 2 conspiracy.

If, however, the intended joint action is not conclusively unreasonable, then the defendants should be afforded the opportunity of establishing the competitive "reasonableness" of their intended actions, notwithstanding their joint possession of monopoly power. The showing that must be made will be particularly demanding because cases involving the joint possession of actual monopoly power warrant less flexibility than either single firm monopolization cases or Section 2 conspiracies that have not yet achieved industry dominance.[56] The potential hazards to competition increase when companies replace individual competitive action with joint action, making these cases inherently more suspect than single firm monopolization cases. At the same time, the potential competitive justifications diminish as the market power of the conspirators increases, thereby distinguishing Section 2 conspiracies in joint possession of monopoly power from the separate and more controversial category of Section 2 conspiracy to which we now turn: incipient conspiracies to monopolize that have not yet achieved monopoly power.

II. Conspiracies to Monopolize in Which the Conspirators Do Not Possess Monopoly Power

Conspiracies to monopolize in which the conspirators have not yet achieved monopoly power have proved particularly troublesome for the courts. Different courts have offered widely divergent opinions on just what constitutes the essential elements of the offense. One group of court decisions has construed the elements as essentially being: (1) proof of the conspiracy; (2) specific intent to seize control of an appreciable amount of interstate commerce; and (3) overt acts in furtherance of the conspiracy.[57] A second group of judicial decisions has imposed a much more rigorous standard, requiring showings of: (1) the existence of the conspiracy; (2) the relevant market; (3) specific intent to acquire monopoly power within the relevant market; and (4) overt acts in furtherance of the conspiracy.[58] The few com-

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terms); American Tobacco Co. v. United States, 328 U.S. 781 (1946) (joint monopolization through price fixing and the allocation of raw materials).

56. *See* text accompanying notes 39–42 *supra*.

57. *See, e.g.*, Salco Corp. v. General Motors Corp., 517 F.2d 567, 576 (10th Cir. 1975); United States v. Consolidated Laundries Corp., 219 F.2d 563, 572–73 (2d Cir. 1961); United States v. National City Lines, 186 F.2d 562, 567–68 (7th Cir. 1951); Giant Paper & Film Corp. v. Albemarle Paper Co., 430 F. Supp. 981 (S.D.N.Y. 1977); Cullum Elec. & Mechanical, Inc. v. Mechanical Contractors Ass'n of South Carolina, 436 F. Supp. 418 (D.S.C. 1976), *aff'd*, 569 F.2d (4th Cir.), *cert. denied*, 439 U.S. 910 (1978); Tire Sales Corp. v. Cities Service Oil Co., 410 F. Supp. 1222, 1231–32 (N.D. Ill. 1976).

58. *See, e.g.*, Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 991 (9th Cir. 1980); Hudson Valley Asbestos Corp. v. Tougher Heating & Plumbing Co., 510 F.2d 1140, 1144 (2d Cir.), *cert. denied*, 421 U.S. 1011 (1975); Sulmeyer v. Coca Cola Co., 515 F.2d 835 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418, 420 (D.C. Cir. 1957); Joe Westbrook, Inc. v. Chrysler Corp., 419 F. Supp. 824 (N.D. Ga. 1976).

mentators who have studied the subject are likewise in disagreement as to precisely how to define the offense.[59] The courts and commentators do agree, however, that the essential elements of a conspiracy to monopolize do *not* include the possession of actual monopoly power or a "dangerous probability of success" that actual monopoly power will be achieved.[60]

These differences of opinion are not simply a matter of esoteric semantics but can most definitely affect the outcomes of particular cases. Consider, for example, the Seventh Circuit's decision in *United States v. National City Lines*.[61] The case involved an agreement between several of the nation's largest suppliers of busses, tires, and petroleum products to provide financing to a group of local public transportation systems in return for their agreement to purchase supplies exclusively from the suppliers for a ten year period. While the dollar amount of commerce affected was substantial, it amounted to an insignificant percentage of the total commerce in similar products. The Seventh Circuit nevertheless upheld a Section 2 conspiracy conviction, reasoning that it was sufficient that the defendants had conspired to control an appreciable amount of interstate commerce.[62] Given the insignificant share of the overall market affected by the conspiracy, it is highly doubtful that the conviction would have been upheld if definition of the relevant market, rather than just an appreciable amount of interstate commerce, had been required.[63]

Ironically, the source of the confusion in the lower courts is a 1947 decision in which the Supreme Court attempted to clarify the law of conspiracies to monopolize, *United States v. Yellow Cab Co.*[64] The case involved an alleged Sherman Act Section 1 and Section 2 conspiracy between a taxicab manufacturer and its cab operating subsidiaries in four major American cities. The subsidiaries were required to purchase all of their taxicabs from the parent manufacturer, thereby foreclosing competitors from approximately 5,000 replacement cab sales. In relevant part, the complaint alleged that the defendants had conspired to monopolize the sale of taxicabs in the four cities where the subsidiaries operated.[65] The trial court dismissed the complaint for failing to state a cause of action, since the complaint had not alleged an effect on total interstate cab sales. The Supreme Court reversed

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59. For example, compare the standards for testing conspiracies to monopolize suggested by each of the following: L. SULLIVAN, ANTITRUST 132–34 (1977); J. VON KALINOWSKI, ANTITRUST LAW AND TRADE REGULATION § 9.02(1)(a) (1979); Comment, *The Relevant Market Concept in Conspiracy to Monopolize Cases under Section 2 of the Sherman Act*, 44 U. CHI. L. REV. 805 (1977).

60. *See, e.g.*, Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919 (9th Cir. 1980); Giant Paper & Film Corp. v. Albemarle Paper Co., 430 F. Supp. 981 (S.D.N.Y. 1977); and Joe Westbrook, Inc. v. Chrysler Corp., 419 F. Supp. 824 (N.D. Ga. 1976).

61. 186 F.2d 562 (7th Cir. 1951).

62. *Id.* at 567–68.

63. As a further example, *see* Tire Sales Corp. v. Cities Service Oil Co., 410 F. Supp. 1222 (N.D. Ill. 1976), involving a set of facts closely similar to those in *National City Lines*. The district court stated that it had "serious reservations about the *City Lines* holding," but then held that it was compelled to follow that decision and deny a defense request for summary judgment against an alleged Section 2 conspiracy targeted at a "miniscule" share of the overall product market. *Id.* at 1231.

64. 332 U.S. 218 (1947).

65. *Id.* at 226.

and remanded the case, holding that the complaint allegations were sufficient and that it was not necessary to plead the "importance of" the amount of commerce affected by the conspiracy "in relation to" the "entire amount" of that commerce throughout the United States. It was sufficient, reasoned the Court, that the complaint alleged a conspiracy that might result in monopolization of "an appreciable segment" of interstate commerce.[66]

The opinion in *Yellow Cab* is regrettably ambiguous. On the one hand, the case can be read as rejecting proof of a defined relevant market as an essential element in conspiracies to monopolize. Several lower court opinions have construed the case in just this manner, holding that it is enough that any appreciable "amount" of commerce is the subject of a Section 2 conspiracy.[67] On the other hand, *Yellow Cab* can be viewed as simply rejecting a requirement that Section 2 conspiracies be judged from the perspective of total nationwide trade, as opposed to trade within some lesser segment of commerce. At least one lower federal court has suggested this narrower interpretation of the decision, concluding that, far from rejecting a relevant market requirement, the Supreme Court was essentially proposing such a requirement.[68]

For the sake of statutory consistency, let alone other reasons, the narrower interpretation of *Yellow Cab* seems more sensible. Section 2 makes it an offense to monopolize, or to attempt or conspire to monopolize, "any part" of interstate commerce. The statutory reference to "any part" of commerce has been construed to require proof of the relevant market in cases of actual monopolization and attempted monopolization.[69] It is illogical for courts to be using precisely this same statutory reference to justify the elimination of a relevant market requirement from Section 2 conspiracy cases. As stated by a court critical of the view that a relevant market need not be part of a conspiracy to monopolize case: "[I]t is difficult to see why any part should be defined differently in a conspiracy case than in a monopolization or attempt-to-monopolize case, where it still requires definition of a relevant market."[70]

As discussed earlier in this Article,[71] other equally compelling reasons exist for requiring definition of the relevant market in Section 2 conspiracy

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66. *Id.*

67. *See, e.g.*, Salco Corp. v. General Motors Corp., 517 F.2d 567, 576 (10th Cir. 1975); United States v. Consolidated Laundries Corp., 291 F.2d 563, 573 (2d Cir. 1961); United States v. National City Lines, 186 F.2d 562, 567–68 (7th Cir. 1951).

68. *See* Tire Sales Corp. v. Cities Service Oil Co., 410 F. Supp. 1222, 1231–32 (N.D. Ill. 1976).

69. *See, e.g.*, United States v. Grinnell Corp., 384 U.S. 563, at 570–71 (1966) (requiring proof of the relevant market in actual monopolization cases); FLM Collision Parts, Inc. v. Ford Motor Co., 543 F.2d 1019, 1030 (2d Cir. 1976) (requiring proof of the relevant market in an attempt case). Even the Ninth Circuit, which in earlier decisions rejected a relevant market showing as part of a Section 2 attempt case, now considers relevant market evidence as at least bearing upon the issue of "specific intent to monopolize." *See, e.g.*, Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc. 627 F.2d 919 (9th Cir. 1980). *See generally* ABA ANTITRUST LAW DEVELOPMENTS 60–63 (1975); J. VON KALINOWSKI, ANTITRUST LAW AND TRADE REGULATION § 9.01[4] (1979).

70. Tire Sales Corp. v. Cities Service Oil Co., 410 F. Supp. 1222, 1232 (N.D. Ill. 1976).

71. *See* text accompanying notes 23–34 *supra*.

cases. These cases are, by the very phrasing of the statutory offense, concerned with conspiracies "to monopolize." A monopoly (*i.e.*, the objective of such a conspiracy) is characterized by the possession of monopoly power, meaning the power to control price and entry by actual and potential competitors.[72] If the subject of the conspiracy is such that competitive products would remain readily available, even assuming the complete success of the conspiracy, then the conspiracy is not "intended" to achieve "control" over industry price and production; control of these factors will in any event remain beyond the conspirators' reach. Such a conspiracy, lacking the requisite "intent" to secure monopoly power, is not properly labeled a conspiracy to monopolize, but is, at most, a Sherman Act Section 1 conspiracy in restraint of trade. To distinguish these non-monopoly-oriented conspiracies from true conspiracies to monopolize, the availability of substitute products or services becomes a potentially vital inquiry—an inquiry that is, of course, of the very essence of defining a relevant market. Thus, the very parameters of the offense seem to require relevant market considerations as an essential part of a Section 2 conspiracy case.[73]

With the notable exception of the relevant market issue, the courts and commentators are in general agreement as to the other elements of a conspiracy to monopolize in which the conspirators do not possess joint monopoly power.[74] These elements include: (1) the existence of the "conspiracy"; (2) "overt acts" in furtherance of the conspiracy; and (3) "specific intent" to achieve monopoly power within the relevant market.[75] The first two of these elements are reasonably straightforward. The existence of the conspiracy may, in unique cases, be established by the express statements of the conspirators but is normally proven by the course of dealings between them or other circumstantial evidence.[76] The overt acts that must be shown need not be in themselves predatory, coercive or otherwise exclusionary. In fact, virtually any affirmative action will, in theory at least, qualify, provided that it is sufficient to demonstrate that the alleged conspiracy has gone beyond the stage of idle speculation and has become an active agreement. Normally, however, the overt acts will consist of activities that are in themselves

72. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956) (the power to "control prices or exclude competition"); American Tobacco Co. v. United States, 328 U.S. 781, 811 (1946) (the power to "exclude actual or potential competition from the field").

73. *See, e.g.*, Hudson Valley Asbestos Corp. v. Tougher Heating & Plumbing Co., 510 F.2d 1140 (2d Cir.), *cert. denied*, 421 U.S. 1011 (1975). The Second Circuit considered the relative positions of the conspirators within the relevant market as evidence of "the futility of any effort to monopolize" the market, and, hence, as compelling evidence that "specific intent" was lacking. *Id.* at 1144.

74. *See, e.g.*, the cases cited in notes 57–58 *supra*; L. SULLIVAN, ANTITRUST 132–34 (1977); J. VON KALINOWSKI, ANTITRUST LAW AND TRADE REGULATION § 9.02[1(a)] (1979).

75. Those courts that reject the necessity of proving a relevant market would phrase this element as: "specific intent" to control an "appreciable part" of interstate commerce. *See, e.g.*, Salco Corp. v. General Motors Corp., 517 F.2d 567, 576 (10th Cir. 1975); United States v. Consolidated Laundries Corp., 291 F.2d 563, 573 (2d Cir. 1961).

76. *See, e.g.*, American Tobacco Co. v. United States, 328 U.S. 781 (1946) (conspiracy to monopolize proven by parallel behavior and course of dealings between conspirators). *See* the cases and authorities cited in note 17 *supra*.

predatory or exclusionary, such as the allocation of territories or customers, price fixing, or exclusive dealing requirements.[77]

The third remaining element, proof of "specific intent," is conceptually a much more difficult issue to resolve. An earlier portion of this Article discussed the type of generalized intent that is required for Section 2 conspiracies in which the conspirators jointly possess monopoly power[78] and distinguished this broader concept of intent from the more demanding "specific intent" required if joint monopoly power has not yet been reached.[79] This distinction does not tell us, however, precisely what is needed to show specific intent, other than the fact that it is something more than the generalized intent applicable to the more extreme Section 2 conspiracy cases such as *American Tobacco* and *Griffith,* discussed in Part I of the Article.

Professors Areeda and Turner have correctly observed, in the context of Section 2 attempts to monopolize, that "'specific intent' clearly cannot include the mere intention to prevail over one's rivals. To declare that intention unlawful would defeat the antitrust goal of encouraging competition on the merits, which is heavily motivated by such an intent."[80] Similar logic would seem to apply with equal force to Section 2 conspiracies that have not yet resulted in industry domination. Specific intent for these cases, too, should not mean merely the intent to "prevail over one's rivals," even if such an intention leans towards the establishment of industry dominance. To so define the term is, in effect, to throw out the baby with the bath water. Undesirable concerted action will be discouraged, but competitively desirable joint action may likewise be thwarted. Such a result would not only lose sight of, but also actually cut against, the very reason for prohibiting conspiracies to monopolize: to discourage concerted action that *threatens* competition and that, if left alone, could result in the joint acquisition of monopoly power.[81]

Various courts and commentators have grappled with the analogous issue of how to define "specific intent" for cases of attempted monopolization.[82] In

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77. *See, e.g.,* United States v. Yellow Cab Co., 332 U.S. 218 (1947) (exclusive dealing requirements); American Tobacco Co. v. United States, 328 U.S. 781 (1946) (allocation of raw materials and price fixing); United States v. Consolidated Laundries Corp., 291 F.2d 563 (2d Cir. 1961) (allocation of customers and coercing others into joining the conspiracy). *See generally* J. VON KALINOWSKI, ANTITRUST LAW AND TRADE REGULATION § 9.02[3] (1979).

78. In such a case, the required "intent" is the intent to engage in joint conduct having the "necessary and direct result" of further entrenching or maintaining the conspirators' joint monopoly power. *See* text accompanying notes 12–14 *supra.*

79. *See* text accompanying note 15 *supra.* Note that the Supreme Court drew an express distinction in *Griffith* between the type of "intent" required where a conspiracy has obtained monopoly power and the more demanding "specific intent" required if monopoly power has not yet been achieved. United States v. Griffith, 334 U.S. 100, 105 (1948).

80. P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 822a, at 314 (1977) (footnote omitted).

81. *Contra,* Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 926 (9th Cir. 1980).

82. *See, e.g.,* P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 822a, at 314 (1977); L. SULLIVAN, ANTITRUST 136 (1977); Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two,* 72 MICH. L. REV. 375, 395 (1974). A recent and particularly insightful decision on defining specific intent for attempted monopolization cases is the Federal Trade Commission's decision in *In re* E.I. du Pont de Nemours & Co., No. 9108, 96 F.T.C. 653 (1980), in which the Commision reasoned that the intent that must be established is an intent to achieve monopoly power through conduct that is predatory or otherwise competitively unreasonable.

essence, the solution frequently proposed is to define "specific intent" as the intent to achieve monopoly power through conduct that is "predatory or otherwise unreasonable."[83] This definition offers the obvious advantage of built-in flexibility comparable to that of the Sherman Act Section 1 rule of reason. A similar approach, with its desirable flexibility, seems proper for Section 2 conspiracy cases in which actual joint monopolization has not yet been achieved. Thus, the specific intent required for these cases would not simply be the intent to acquire monopoly power but, instead, the intent to acquire such power through joint conduct that is predatory or otherwise competitively unreasonable.

Some intended joint conduct will be so clearly predatory or exclusionary as to readily meet such a test without the necessity of an in-depth assessment of the competitive reasonableness of the conduct.[84] Other intended conduct will be less obviously anticompetitive and will require consideration of a number of possible factors bearing upon the competitive "reasonableness" of the conduct, such as the industry structure, the conspirators' relative positions within the industry, the purported purpose of the conduct and its impact upon competition, and the availability of less restrictive alternatives.[85] A definition of specific intent that makes allowance for these and other potentially relevant competitive considerations will promote the underlying purposes of the Sherman Act while not proscribing concerted action that, far from threatening competition, actually promotes it.

Part I of this Article similarly concluded that not all joint conduct that tends towards the establishment or maintenance of monopoly power is prohibited by Section 2, even where the parties engaging in the conduct have already achieved actual joint monopoly power. Consideration should still be given to possible competitive justifications for the conduct, provided that the conduct is not so clearly anticompetitive as to be conclusively unreasonable.[86] Part I concluded that where joint monopoly power has already been achieved by the defendants, the potential risks to competition resulting from their joint action become particularly great, so that the burden of establishing the competitive justifications for the conduct becomes especially demanding. The same is not necessarily true, however, of Section 2 conspiracies in which the participants do not yet possess joint market control. Assume, for example, that the challenged joint conduct consists of a product development

83. *See* note 82 *supra*.

84. *See* the examples in note 55 *supra*. As recently stated by the Ninth Circuit: "Such clearly exclusionary behavior, even though it poses no immediate measurable danger to the market, presents the potential for mischief. To the extent that such conduct inevitably harms competition, there is little reason to tolerate it." Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 925 (9th Cir. 1980).

85. For a general discussion of the considerations involved in a rule of reason type analysis, *see generally* Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1 (1979); National Society of Professional Engineers v. United States, 435 U.S. 679 (1978); and United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980).

86. *See* text accompanying notes 53–56 *supra*.

venture among the smaller firms within an industry dominated by much larger firms not privy to the venture. Further assume that the costs and risks of the venture are such that it will not attract participants unless they are given exclusive rights in the fruits of the venture. This exclusivity may be quite proper in such a situation, even though inappropriate if attached to a venture involving the dominant firms within the industry. Competition may actually be enhanced as the smaller firms become more effective competitors with the industry giants. Thus, greater flexibility is needed when assessing the competitive reasonableness of joint action among alleged Section 2 conspirators not yet in possession of actual industry control than would be appropriate if they already had secured such control.

In summary, Section 2 conspiracies in which the conspirators do not individually or jointly possess monopoly power raise significant issues that distinguish these cases from the more egregious Section 2 conspiracies discussed in Part I of this Article. As a result, they are to be judged by a different legal standard. The proper elements of this standard include: (1) the existence of the conspiracy;[87] (2) the relevant market within which the conspiracy operates;[88] (3) specific intent to achieve monopoly power within the relevant market through acts that are predatory or otherwise competitively unreasonable, as opposed to the more generalized intent applicable to Section 2 conspiracies in which the conspirators possess joint monopoly power;[89] and (4) overt acts demonstrating that the conspiracy has gone beyond the stage of mere idle speculation and has become an actual agreement.[90]

III. Conclusion and Decisional Model

Considerable controversy and confusion abound in the courts concerning the essential elements of a Sherman Act Section 2 conspiracy to monopolize. A careful reading of leading judicial decisions on the subject reveals that this confusion has largely resulted from a failure to distinguish between two very different types of conspiracies that have been challenged under Section 2 of the Sherman Act. The first type of Section 2 conspiracy, discussed in Part I of the Article, involves those conspiracies to monopolize in which the conspirators jointly possess monopoly power. The Supreme Court's decisions in *American Tobacco* and *Griffith* are illustrative of this first type of case. The second form of Section 2 conspiracy, discussed in Part II of the Article, encompasses those conspiracies to monopolize in which the conspirators have not individually or jointly achieved monopoly power. The governing legal principles are markedly different, depending upon which type of Section 2 conspiracy is at issue in a given case.

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87. *See* text accompanying note 76 *supra*.
88. *See* text accompanying notes 69–73 *supra*.
89. *See* text accompanying notes 78–86 *supra*.
90. *See* text accompanying note 77 *supra*.

This Article identified specific factors to be considered when assessing the antitrust legality of each type of Sherman Act Section 2 conspiracy. When these factors are combined into a single framework, they provide a coordinated decisional model that can be used by practitioners and the courts in analyzing conspiracy cases brought under Section 2 of the Sherman Act. The components of the decisional model are as follows:

(1) The existence of a Section 2 conspiracy must first be demonstrated, whether by the express statements of the conspirators, the course of dealings between them, or other circumstantial evidence.

(2) The relevant market within which the conspiracy operates must also be defined.

(3) Once the existence of the conspiracy has been established, the market shares or other evidence of market power of the individual conspirators can be aggregated for purposes of determining whether the conspirators possess joint monopoly power. If the conspirators do not possess such joint power, then the analysis should proceed to step (7) below.

(4) If the conspirators have joint monopoly power, it must additionally be shown that they intended to engage in concerted action having the "necessary and direct result" of maintaining their combined monopoly position within the relevant market, *i.e.*, "general intent" must be proven.

(5) It must be shown that the conspirators have engaged in overt acts demonstrating that the conspiracy has gone beyond the stage of mere idle speculation. These overt acts need not be in themselves predatory or exclusionary, and may even consist of the very same acts used to prove circumstantially the existence of the conspiracy and the conspirators' general intent.

(6) Unless the conduct in which the conspirators intended to engage is conclusively unreasonable, the defendants should be afforded the opportunity of proving the competitive reasonableness of their conduct.

(7) If the conspirators do not have joint monopoly power, then once the conspiracy and the existence of the relevant market have been established it must be shown that the conspirators specifically intended to achieve monopoly power within the relevant market through acts that are predatory or otherwise competitively unreasonable. Unless the acts in which the conspirators intended to engage are clearly predatory or exclusionary, the competitive unreasonableness of the intended conduct must be affirmatively demonstrated, with a view to such considerations as the industry structure, the conspirators' relative positions within the industry, the purported purpose of the conduct and its impact upon competition, and the availability of less restrictive alternatives.

(8) Finally, to demonstrate that the conspiracy has moved beyond the stage of mere idle speculation and has become an active agreement to achieve monopoly power, overt acts must be shown.